

grant, the alien shall retain the conditional grant of suspension of deportation or cancellation of removal upon return to the United States following a temporary absence abroad and be permitted to resume completion of his or her case, provided that:

(i) The alien departed on or before September 30, 1998 with or without a grant of advance parole from the District Director; or

(ii) The alien, prior to his or her departure from the United States after September 30, 1998, obtained a grant of advance parole from the District Director in accordance with section 212(d)(5) of the Act and §1212.5 of this chapter and complied with the terms and conditions of the advance parole.

(c) *Grants of suspension of deportation or cancellation of removal in fiscal years subsequent to fiscal year 1998.* On and after October 1, 1998, the Immigration Court and the Board may grant applications for suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect prior to April 1, 1997) or cancellation of removal and adjustment of status under section 240A(b) of the Act that meet the statutory requirements for such relief and warrant a favorable exercise of discretion until the annual numerical limitation has been reached in that fiscal year. The awarding of such relief shall be determined according to the date the order granting such relief becomes final as defined in §§1003.1(d)(3) and 1003.39 of this chapter.

(1) *Applicability of the annual cap.* When grants are no longer available in a fiscal year, further decisions to grant or deny such relief shall be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year. Immigration judges and the Board may deny without reserving decision or may pre-empt those suspension of deportation or cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief. The basis of such denial or preemption may not be based on an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically noted in section 101(f) of the Act, a failure to establish exceptional or extremely unusual hard-

ship to a qualifying relative in cancellation cases, or a failure to establish extreme hardship to the applicant and/or qualifying relative in suspension cases.

(2) *Aliens applying for additional forms of relief.* Whether or not the cap has been reached, the Immigration Court or the Board shall adjudicate concurrently all other forms of relief for which the alien has applied. Applications for suspension of deportation or cancellation of removal shall be denied in the exercise of discretion if the alien is granted asylum or adjustment of status, including pursuant to section 202 of NACARA, while the suspension of deportation or cancellation of removal application is pending. Where an appeal of a decision granting asylum or adjustment is sustained by the Board, a decision to deny as a matter of discretion an application for suspension of deportation or cancellation of removal on this basis shall be reconsidered.

[63 FR 52138, Sept. 30, 1998, as amended at 66 FR 6446, Jan. 22, 2001]

§§ 1240.22–1240.24 [Reserved]

Subpart C—Voluntary Departure

§ 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

(a) *Eligibility: general.* An alien previously granted voluntary departure under section 240B of the Act, including by the Service under §240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.

(b) *Prior to completion of removal proceedings—*(1) *Grant by the immigration judge.* (i) An alien may be granted voluntary departure by an immigration judge pursuant to section 240B(a) of the Act only if the alien:

(A) Makes such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;

(B) Makes no additional requests for relief (or if such requests have been made, such requests are withdrawn